

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KICKFLIP, INC.,)	
)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 12-1369-LPS
)	
FACEBOOK, INC.,)	
)	
Defendant.)	
)	

MOTION FOR LEAVE TO FILE MOTION TO COMPEL PRODUCTION

Defendant Facebook, Inc. (“Facebook”) hereby moves the Court for leave to file the accompanying Motion to Compel Production (attached as Exhibit 1).

Facebook requests that the Court entertain the attached Motion to Compel in lieu of the discovery dispute procedure outlined in paragraph 5(g) of the Scheduling Order. D.I. 30 at 6. During the discovery teleconference on October 7, 2015, the Court indicated that the three-page letter briefs permitted by that procedure were insufficient to permit the Court to resolve the important attorney-client privilege issues raised by Kickflip’s conduct. *See* D.I. 142 (Transcript of Oct. 7, 2015 Teleconference) at 44-45. Accordingly, the Court ordered the parties to brief in full the scope of waiver and crime-fraud exception issues raised by Facebook’s request that Kickflip be ordered to produce documents in the possession of its litigation counsel relating or referring to the November or December Agreements. *Id.* at 45. *See* D.I. 136, 143 and 145 for briefs. The current motion addresses similarly important issues arising from the privilege logs that, during the same teleconference, the Court ordered Kickflip to produce, listing documents relating to its efforts to ascertain the true creation date of the December Agreement and the purported failure of Mr. Benisek’s laptop.

To conserve judicial resources and avoid unnecessary delay, Facebook respectfully requests that the Court similarly permit Facebook to present those issues in the form of a fully-briefed motion. Accordingly, Facebook attaches a 13-page Motion to Compel Production, asking the Court to order production of the logged documents, or at a minimum in camera review, by applying the crime-fraud exception or pursuant to the Court's authority to investigate and sanction discovery abuses. If the Court agrees to entertain this motion, Facebook proposes that Kickflip be allowed to file an answering brief of the same length no later than two weeks after the Court's order, and that Facebook be allowed to file a reply brief of 6 pages no later than three weeks after the Court's order. Should the Court grant the Motion for Leave to File this week, Facebook would be amenable to small adjustments to the briefing schedule in light of the upcoming holidays, if Kickflip so requires.

Prior to filing the instant Motion, Facebook contacted Kickflip on numerous occasions to attempt to resolve this dispute by compromise or to streamline the Court's review of the issue. *See* Ex. 2 (email chain between Facebook and Kickflip's litigation counsel regarding proposals for resolving privilege log dispute). The parties met and conferred on December 23, 2015, during which Facebook explained its preference to submit a fully-briefed motion to avoid wasting judicial resources with preliminary three-page letter briefs that this Court acknowledged were insufficient to resolve the underlying substantive issues. Kickflip was unwilling to compromise and indicated that it would oppose Facebook's Motion for Leave to File the Motion to Compel Production.

STATEMENT PURSUANT TO LOCAL RULE 7.1.1

Pursuant to Local Rule 7.1.1, I hereby certify that counsel for Defendant discussed the relief requested in the motion with counsel for Plaintiff Kickflip, Inc., and Plaintiff indicated it opposes the motion.

/s/ Benjamin J. Schladweiler

Benjamin J. Schladweiler (#4601)

Respectfully submitted,

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Counsel for Defendant Facebook, Inc.

Dated: December 23, 2015

CERTIFICATE OF SERVICE

I, Benjamin J. Schladweiler, hereby certify that on December 23, 2015, a true copy of the foregoing *Motion for Leave to File Motion to Compel Production* was served via electronic mail upon the following counsel of record:

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